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No. 525

In the Supreme Court of the United States

OCTOBER TERM, 1968

MATSON NAVIGATION COMPANY, PETITIONER

v.

C. R. SMITH, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF COMMERCE IN OPPOSITION

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OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1) is reported at 394 F. 2d 514. The memorandum opinion and order of the district court (Pet. App. 3–27) is reported at 258 F. Supp. 144.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2) was entered on May 17, 1968. A timely petition for rehearing was denied on June 21, 1968 (Pet. App. 2). The petition for a writ of certiorari was filed on September 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Commerce reasonably interpreted § 805(a) of the Merchant Marine Act, 1936, 46 U.S.C. 1223(a), in ruling that the granting of the application of a subsidized operator to carry cargo to domestic ports in the course of its foreign-trade voyages will constitute "unfair competition" to a non-subsidized operator in the domestic trade only if the subsidized operator will thereby gain a substantial competitive advantage over the unsubsidized operator by virtue of the receipt of subsidy.

2. If the Secretary's standard is permissible, whether his conclusion, that the granting of States Steamship Company's application for permission to increase its calls at Hawaii would not give States a substantial competitive advantage over petitioner, is supported by substantial evidence and adequate findings.

STATUTES INVOLVED

Section 805(a), Merchant Marine Act, 1936, as amended, 46 U.S.C. 1223(a), is set forth in full in the Appendix to the Petition, pp. 86–87. Section 101 of the Act (46 U.S.C. 1101), Section 506, as amended (46 U.S.C. 1156), and Section 605(a), as amended (46 U.S.C. 1175(a)) are set out in Appendix C to the Brief of Respondent States Steamship Company in Opposition to the Petition.

STATEMENT

This action was brought in the United States District Court for the Northern District of California by petitioner Matson Navigation Company. Petitioner sought to have set aside a determination of the Secretary of

Commerce (Pet. App. 28–85) granting respondent States Steamship Company, a subsidized operator in foreign commerce, permission to increase its intermediate service between California and Hawaii by vessels engaged in the California-Far East Trade from 13 to 26 trips annually in each direction. The Secretary's decision brought to a close four years of administrative proceedings, which had produced four previous administrative decisions and a transcript of 7,718 pages (Pet. App. 5). The district court upheld the Secretary's determination in a comprehensive opinion (Pet. App. 3–27), which the Ninth Circuit adopted *per curiam* (Pet. App. 1–3).

Under Section 805(a) of the Merchant Marine Act of 1936 (46 U.S.C. 1223(a)), the Secretary was required to decide whether granting States authority to double its Hawaii callings would result in "unfair competition" to Matson,[1] which "[o]ver the last decade or more * * * consistently has carried about 98% of all cargo between Hawaii and the Pacific Coast" (Pet. App. 59). Because it operates in foreign commerce, States receives both a "construction-differential subsidy" ("CDS"; 46 U.S.C. 1151) and an "operating-differential subsidy" ("ODS"; 46 U.S.C. 1171) to help it compete with foreign lines enjoying lower costs. Sections 506 and 605(a) (46 U.S.C. 1156, 1175(a)) require refund of these subsidies, in amounts proportional to the revenue derived, in certain cases in

[1] Section 805(a) refers to a person "operating exclusively in the coastwise or intercoastal service." In the administrative proceedings and the courts below, States contended unsuccessfully that Matson did not so operate (see Pet. App. 46–51).

which subsidized vessels stop at intermediate American ports, including Hawaii, to take on or discharge domestic freight in the course of a voyage in foreign trade. In arguing that States' extended service would be "unfair competition," Matson contended that these refunds were insufficient to dispel the competitive advantage States acquired from the subsidies and that any such residual benefit constitutes "unfair competition" as a matter of law; alternatively, it contended that the size of this "residual subsidy" alone should determine the issue. States, on the other hand, sought to confine Section 805(a) to cases where one operator uses subsidized and unsubsidized ships in wholly foreign and wholly domestic trade, respectively. Where one vessel is used in mixed trade, calling as States' do at domestic ports en route to or from foreign ones, States' view is that Sections 506 and 605(a) specifically authorize this trade on the single condition that the required refunds are made; in this case, it says, Congress has determined what steps will eliminate "unfair competition," and there is no need to resort to Section 805(a).

The Secretary's thorough opinion rejected both positions (Pet. App. 32–68). He found that mixed trade voyages such as States' are subject to the requirement of Section 805(a); but that "unfair competition" is to be measured not mechanically, as petitioner wishes, but by consideration whether the situation, taken as a whole, reveals that a "substantial competitive advantage to the subsidized operator" would result (Pet. App. 58). The Secretary then made extensive findings concerning whether the "over-all

picture" showed such an advantage, and found that it did not (Pet. App. 56–68). Among the factors he considered in reaching this conclusion were that Matson presently enjoys a virtual monopoly of the California-Hawaii trade (Pet. App. 58–60); that States' carryings, even under the projected increase in its service, would be only about 5 percent of Matson's tonnage (Pet. App. 59–60); that the extent of residual subsidy was considerably less than Matson projected—specifically, that only 29.3 percent of the amount of subsidy originally allocated to the California-Hawaii leg of States' California-Orient routes would be left after the required refunds to help carry on that segment cargo that is 61.5 percent foreign by volume (Pet. App. 61–64); and that any impact of such a residue would be lessened by statutory and contractual restrictions upon subsidized contractors and substantial government aid in various forms available to domestic operators (Pet. App. 67; *infra,* n. 10).

The Secretary further noted that even Matson's statistics show yearly growth in California-Hawaii trade of at least 1 to 2 percent (Pet. App. 67–68), and thus that within 5 years Matson would be carrying as much cargo as it does now (Pet. App. 68). He also noted signs that Matson was presently unable to provide adequate service (Pet. App. 75–78), and that (Pet. App. 79) "the proposed increased States' service at this juncture offers promise of remedy for the 'tightness of Matson's closely run service'. * * *." Finally, in granting States' application, the Secretary provided that "at the expiration of a three-year period, the Maritime Administration will take prompt

steps to schedule an appropriate (and expeditious) proceeding in order to determine on the basis of accrued actual experience whether the authorization for 26 States voyages, or any part thereof, should continue in effect" (Pet. App. 85).

ARGUMENT

The ruling below, sustaining the granting by the Secretary of Commerce of States Steamship Company's application for increased calls at Hawaii, is clearly correct, and is not in conflict with any decision of any other court of appeals. Moreover, the Secretary's ruling, by its terms, calls for further administrative proceedings to review whether States authority for increased service is to be continued. Petitioner therefore will have further opportunity to support its claim of "unfair competition," found lacking in merit on the present record, with evidence based upon "accrued actual experience" (Pet. App. 85). Accordingly, further review by this Court is unwarranted.

1. The basic issue is whether the Secretary exceeded his discretion in construing the words "unfair competition" in Section 805(a) to require a determination that grant of an application to engage in domestic freight operations will give a subsidized operator a "substantial competitive advantage" over domestic operators by reason of his subsidy. In arguing that the proper standard is whether a subsidized operator experiences any residual subsidy benefit, petitioner fails to recognize the deference properly due to administrative construction of the statute, neglects im-

portant features of the statutory scheme, and wrongly claims support from and conflict with prior judicial and administrative decisions.

The interpretation by the agency charged with administering the statute may be overturned only if clearly contrary to the manifested intention of Congress. *E.g., Udall* v. *Tallman,* 380 U.S. 1, 16; *Unemployment Comm'n* v. *Aragon,* 329 U.S. 143, 153–154. Here Congress has directed the Secretary to determine whether the granting of an application will result in "unfair competition," but has not attempted to define that term. The very breath of the term indicates a broad discretion in the Secretary in defining the kinds of situations which constitute "unfair competition". *E.g., Mitchell* v. *Budd,* 350 U.S. 473, 480; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297.

Section 805(a), as any subdivision of a major statutory scheme, is to be read in the context of the whole. In this case, the relevant whole—the Merchant Marine Act of 1936—includes Sections 506 and 605(a); these specifically recognize the possibility of mixed trade voyages in, *inter alia,* the California-Hawaii trade, and provide at least a partial remedy for the subsidy benefit problem by requiring *pro rata* refunds. In view of this explicit acceptance of mixed trade voyages stopping at Hawaii, it can hardly be fatal to an application under Section 805(a) that the applicant owns vessels used in the Pacific "and that subsidy helped build them and put them there," as petitioner implies (Pet. 13–14). Although Congress was aware that residual subsidy benefits might re-

main after payment of the Section 506 and 605(a) refunds, it gave the Secretary flexibility to deal with such situations instead of flatly prohibiting the granting of applications of any subsidized operator who would retain a benefit.[2] As the district court stated (Pet. App. 18):

> Cognizant of the dual objectives [*i.e.*, 1) the maintaining of an effective Merchant Marine and 2) the protection of exclusively domestic operators against severe disadvantage by virtue of subsidies to competitors] and unrestricted by specific statutory mandate or judicial precedent, the Secretary correctly rejected a mechanical test of unfair competition. Rather, having concluded that the Act vested in him a wide range of discretion, the Secretary properly adopted a standard which was flexible enough to implement his discretion but restricted enough to substantially preserve in all cases the obvious protective intent of Section 805(a).[3] * * *

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[2] See the testimony of J. C. Peacock, Director of the U.S. Shipping Board Bureau, Department of Commerce, Hearings before Senate Committee on Commerce on S-3500, 74th Cong., 2d Sess. (1936), pp. 75–76, quoted by the district court (Pet. App. 15, n. 12).

[3] The legislative history relied upon by petitioner for the opposite conclusion (Pet. 16–19) supports the Secretary's position. The Farley Report (H. Doc. 118, 74th Cong., 1st Sess. (1935) and Black Committee Report (S. Rep. 898, 74th Cong., 1st Sess. (1935)) dealt with two serious abuses of subsidies: (1) the creation by recipients of mail subsidies of subsidiary or affiliated corporations to operate in the domestic trade, to which the subsidized parent could divert subsidy funds, and (2) subsidy payments to almost exclusively domestic operators, who touched at foreign ports only incidentally in the course of their domestic routes. The district court fairly summarized the thrust

The last paragraph of Section 805(a) does not support petitioner's view. It deals with diversions of funds *after* permission for mixed operations has been granted. As respondent States points out, it was more likely meant to deal with the improper shuffling of funds between domestic and foreign operations which had been the prime concern of the Black and Farley Reports. It, too, must be read with Sections 506 and 605(a), and the apparent congressional acceptance of some residual subsidy benefit in mixed trade voyages. Moreover, it provides criminal, not civil enforcement; it cannot be assumed in advance that States will commit a misdemeanor by engaging in such "diversions."[4] *Seatrain Lines, Inc.* v. *Hodges*, 320 F. 2d 737, 741 (C.A.D.C.).

There is no present conflict of judicial or administrative decisions. Both the district court and the Secretary dealt at length with *Pacific Far East Line, Inc.* v. *Federal Maritime Board*, 275 F. 2d 184 (C.A. D.C.), certiorari denied, 363 U.S. 827 (Pet. App. 16–17, 54–57), correctly pointing out that that decision firmly

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of the legislative history (see Pet. App. 12–14), and properly concluded that "nothing in the legislative history * * * requires the conclusion that Congress thought 'unfair competition' necessarily would result from granting an 805(a) application to an operator seeking permission, while receiving subsidy, to serve one of the mixed foreign and domestic trades enumerated in Sections 506 and 605(a) when subsidy in any (for even something more than a de minimus) amount would remain, after proration, in the domestic segment."

[4] The Act provides for regular auditing of the books of subsidized operators to ensure that subsidies once granted are not misused. See 46 U.S.C. 1173(c).

rejected the notion—still lurking in the petition[5]—that Matson is "fundamentally entitled" to retain its near-monopoly of domestic trade against any subsidized operator.[6] The administrative decisions relied upon by the petitioner are based either upon this doctrine of "fundamental entitlement," now firmly laid to rest,[7] or upon an earlier decision in the present case, subsequently set aside and to be deemed of no precedential force,[8] or upon factual findings irrelevant to the present case.[9] In short, the Secretary's standard of "substantial competitive advantage" is reasonable and consistent with the statutory purposes, and Matson's charge that the administration of § 805(a) is

[5] Thus, petitioner rephrases the argument (Pet. 19–20) as "subsidized operators might be permitted to operate in the domestic trade in situations where there were no exclusive domestic services * * *."

[6] Although petitioner appears to assert (Pet. 24) that States engaged in such unfair practices as were condemned in *Pacific Far East Lines*, the Secretary found that States would not compete "fraudulently, in a cutthroat manner, or in a way that is unfair according to accepted generally applicable legal or ethical standards"; that finding was supported by substantial evidence (Pet. App. 23).

[7] See Pet. App. 56; *States Marine Lines, Inc.—Section 805(a) Application*, 1 S.R.R. (Pike & Fischer) 325 (1961). In the category of decisions relied upon by Matson, but dependent on the discredited doctrine of fundamental entitlement, see, *e.g.*, *Waterman S.S. Corp.—Section 805(a) Application*, 6 F.M.B. 115 (1960).

[8] *E.g.*, *American Export Lines—Puerto Rico Service*, 1 M.A. 285, 3 S.R.R. 898 (1964); *Grace Line, Inc.—Application to call at Puerto Rico*, 1 M.A. 284, 3 S.R.R. 870 (1964).

[9] *E.g. Pacific Far East Lines, Inc.—Section 805(a) Applications*, 4 F.M.B. 580, 595 (1955), where it was found that the grant "would seriously overtonnage the trade" and its "logical extension * * * would be the elimination of exclusively domestic operations."

"chaotic" is unfounded. The only administrative precedent the Secretary's decision rejects is that based upon the judicially-disapproved doctrine of fundamental entitlement.

2. There is a secondary issue whether, having decided upon the "substantial competitive advantage" standard, the Secretary correctly applied it to the particular facts of this case. This issue, involving only this case and already determined by two lower courts using appropriate standards for the review of administrative decisions, does not warrant further review. It is plain, moreover, that the Secretary considered all factors necessary to his determination, and that there is adequate support in the record for the conclusion he reached.

In particular, and contrary to petitioner's implication, the Secretary's opinion does deal with the approximate amount of residual subsidy benefit to States, in sufficient detail to show that it is small, and assumes, *arguendo,* the propriety of using a full-absorption method of allocating costs. (Pet. App. 61–65). While an exact resolution of accounting problems might be important in determining "substantial competitive advantage" in cases where competition among domestic carriers was already keen, the Secretary was not required to overlook Matson's monopoly position, or that even with the requested expansion States would have only 5 percent of Matson's cargo capacity, or that Matson could expect entirely to recoup any loss within five years. In these circumstances, it was sufficient to find, as he did, that any advantage would be small; that States' competition could not be ex-

pected to be "unfair" in the pejorative sense; and that there are equalizing forces which would help to counter any residual subsidy benefit to States.[10] As the district court noted (Pet. App. 20, n. 18) "although admittedly there may be some legitimate disagreement over the actual statistics, the ultimate conclusion that the competitive situation would not be greatly altered is clearly supportable by the record."[11]

In sum, the Secretary refused to allow the "over-all picture" of the competitive situation (Pet. App. 58–60) to become obscured by statistical and accounting contentions which in these circumstances were of only tangential importance to the resolution of the issue whether States obtained a "substantial competitive advantage" from residual subsidy. The correctness of

[10] As the Secretary was merely pointing out that even the "relatively small" advantage to States would be reduced by these factors, there was no greater need for precise calculation here. The factors involved are either statutory or occur in standard ODS agreements of which petitioner is thoroughly aware. Statutory restrictions on subsidized operators are found in §§ 803–805 of the Act, 46 U.S.C. 1221–1223. Advantages to domestic operators include insulation from foreign-flag competition (46 U.S.C. 883), construction financing provisions for vessels to be operated in domestic trade (46 U.S.C. 1159), trade-in and building incentives (46 U.S.C. 1160), and a construction-reserve fund benefit (46 U.S.C. 1161).

[11] Petitioner's other contentions are also without merit. For example, the Secretary's opinion adequately deals with the contention that States' application could be denied because of interest-free use of subsidies, or opportunities for tax deferment (Pet. App. 63–64). As the Secretary noted, these are advantages to *every* subsidized operator, yet the Act clearly contemplates that such operators may engage in domestic trade. The Secretary, moreover, carefully calculated the differences in interest costs (Pet. App. 62–63), and showed that they would not affect the result of the case.

this action is made especially clear by his call for additional administrative proceedings to review whether States' authority for increased service is to be continued. Petitioner will thus have an opportunity to attempt to support its charges of "unfair competition" on the basis of "accrued actual experience" (Pet. App. 85), rather than highly pessimistic statistical projections which the Secretary found to be unwarranted in many respects (*e.g.*, Pet. App. 61–62, 63 n. 1, 64, 70 n. 1).[12]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] Since the Secretary's determination was put into effect when made, the three-year period has now passed, and both Matson and States are pursuing the matter at the administrative level.

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